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In the

Supreme Court of the United States

October Term, 1961

No. 315

RUTH E. TINSLEY,

Appellant,

v.

CITY OF RICHMOND, VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Appeals of Virginia

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

The appellee City of Richmond respectfully moves the Court to dismiss the appeal on the ground that it does not present a substantial federal question. If the Court should treat appellant's appeal as a petition for a writ of certiorari, appellee asks that this motion be treated as a brief in opposition thereto.

SUPPLEMENTARY STATEMENT

The statement of facts in appellant's Jurisdictional Statement is incomplete, and the conclusion on page 6 is erro-

neous. It is true that the record "contains no evidence of violence" at the time and place of appellant's arrest, but it is not true that it shows no "apprehension of violence". The record shows that a tense situation, with substantial apprehension of violence, existed on the streets of Richmond at the time and place of appellant's arrest and that order was maintained largely if not entirely by the very police action of which appellant complains.

On the date of the arrest large numbers of pickets were walking close together on the public sidewalks adjacent to Thalhimer's department store in the block bounded by Sixth, Seventh, Broad and Grace Streets in the central business district of Richmond (R. 9, 10, 12). They were carrying placards intended to persuade others against purchasing merchandise in the store, where the day before several Negroes had sought service at dining facilities within the store, refused to obey the management's direction to leave, and were arrested on trespassing charges. (See *Randolph v. Commonwealth*, 202 Va. 661, 119 S. E. 2d 817, appeal pending this Term.) The pickets were moving close together and were required by police to keep moving in single file (R. 8-13). Large numbers of people had gathered on the sidewalk (R. 10, 29). Because of the obvious danger of violence to the pickets and others, a large-scale program of police protection was immediately instituted in the block to preserve order and to keep the sidewalks unobstructed for passage of pedestrians. A police major and other supervisory officers were placed in command of a large detail assigned solely to maintaining order outside Thalhimer's R. 8-9). In addition to uniformed police, officers in plain clothes mingled with the crowd. The major in command issued orders that all persons on the sidewalk adjoining the store should be kept moving for the purpose of keeping the sidewalks open for pedestrian traffic and for prevention of

disorder. To avoid any appearance of discrimination, even the plainclothesmen were required to keep moving (R. 8-9). Persons waiting for a bus on the sidewalk on Broad Street in front of the store were allowed to stand only in the bus stop area at the curb (R. 8). A newspaper vendor selling papers was ordered to move and did so, but later, after a protest to a police captain by the newspaper management, he returned, stood on a corner, and was not again told to move (R. 13, 18). Every person required to move from a place on the sidewalk did so, with a single exception: the appellant.

THE QUESTION PRESENTED

In her appeal to this Court, appellant has abandoned her contentions that the ordinance was applied to her in a discriminatory manner and that the evidence was not sufficient to sustain her conviction. The sole question is:

Whether an ordinance requiring a person standing on a public sidewalk to move on or separate from other persons when required to so do by a police officer, applied without discrimination in a situation of potential violence, violates any right guaranteed under the due process clause.

NO SUBSTANTIAL QUESTION IS PRESENTED

The question presented is the same as that presented in *People* v. *Hussock*, 6 Misc. 2d 182, 23 N. Y. S. 2d 520; appeal dismissed and certiorari denied sub. nom. *Hussock* v. *New York*, 312 U. S. 659, except that freedom of expression and assembly are not involved in this case.[1]

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[1] Although appellant cites many New York cases, it is interesting to note that she omits the *Hussock* case; *Feiner* v. *New York*, *infra*, and *People* v. *Galpern*, *infra*.

Appellant was not a picket (R. 17, 23). She was not selling newspapers (R. 20). She was not distributing handbills (R. 22). She was not talking to anyone (R. 17).

In support of her novel proposition that there is a constitutionally protected right to stand in one place on a crowded public sidewalk under the circumstances of this case, appellant on page 8 of her Jurisdictional Statement quotes part of a sentence from *Bolling* v. *Sharpe*, 347 U. S. 497, 499. The full sentence, with a portion omitted by appellant in italics, is: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted *except for a proper governmental objective.*"

It is difficult to imagine a more proper governmental objective than maintaining order and freedom of passage on city sidewalks.

Before determining whether the challenged municipal regulation imposes unreasonable restraints on those on the streets, it should be determined whether any constitutionally protected right is involved at all. "The right of the public on the highways is limited to *the right of passage*, with such stoppage as business or necessity may require * * *." *Commonwealth* v. *Challis*, 8 Pa. Super. 130, 132 (italics added). Appellant appears to recognize this, saying on page 14 of her Jurisdictional Statement that this case involves "infringement of a basic liberty, that of freedom of movement." This is not true. The absolute "liberty" contended for is that of *refraining from* movement from a place on a public sidewalk whose primary purpose is to provide freedom of movement for the public generally.

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary

purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets." *Schneider* v. *Irvington*, 308 U. S. 147, 160, quoted in *Robert* v. *Norfolk*, 188 Va. 413, 419-22, 49 S. E. 2d 697, 700, 701, and *Ex Parte Bodkin*, 86 Cal. App. 2d 208, 194 P. 2d 588, 590.

Even in free speech cases, this Court has recognized that liberty is not absolute, particularly when public streets are involved. "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets." *Feiner* v. *New York*, 340 U. S. 315, 320.[2]

First it should be noted that Virginia prohibits governmental restraints on freedom of expression as fully as does this Court. *Robert* v. *Norfolk*, *supra*; *Edwards* v. *Commonwealth*, 191 Va. 272, 60 S. E. 2d 916; Va. Constitution, Sec. 12.

But in deciding this case, the Court "should first set to one side decisions which are apt to mislead rather than assist".[3] It need not concern itself with the cases cited by

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[2] The dissenting opinions say that police, instead of arresting Feiner for disorderly conduct, should have protected him. Despite restlessness of the crowd, there was "no showing of any attempt to quiet it; pedestrians were forced to walk into the street, *but there was no effort to clear a path on the sidewalk*." Black, J., 340 U. S. at 327 (italics added). When addressing unsympathetic audiences "speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech." Douglas, J., id. at 331. Cf. *Downie* v. *Powers*, 193 F. 2d 760 (10th Cir.).

[3] Frankfurter, J., concurring in *Niemotko* v. *Maryland*, 340 U. S. 268, 273, 276, *Kunz* v. *New York*, 340 U. S. 290, and *Feiner* v. *New York*, *supra*.

appellant which invalidated restraints on free speech or struck down vague ordinances making it criminal to do such things as "lounge", "loiter", "loaf" or "idle", regardless of surrounding circumstances.[4]

The Richmond ordinance mentions "loitering", but it is clear that as applied, and as construed by the court below, it is not just a loitering ordinance. It prohibits, under certain circumstances, *any* standing on a public way after being told by police to move or to separate from others. In applying it, there is no determination of whether a person standing on a sidewalk is also lounging, loitering, loafing, or idling.

There is nothing vague about the ordinance. It meets the test established by this Court. It is "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." It does not forbid or require the doing of an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *". *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

The only question remaining is whether the ordinance delegates such a degree of discretion to the individual patrolman that its application must be held to deprive those to whom it is applied of liberty or property without due process of law. The Richmond ordinance bears little resemblance to that declared invalid in *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666. There the crime was not

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[4] *St. Louis* v. *Gloner*, 210 Mo. 502, 109 S. W. 30; *People* v. *Diaz*, 4 N. Y. 2d 469, 151 N. E. 2d 871; *Territory of Hawaii* v. *Anduha*, 48 F. 2d 171 (9th Cir.); *Ex parte Mittelstaedt*, 164 Tex. Crim. 115, 297 S. W. 2d 153; *Soles* v. *Vadalia*, 92 Ga. App. 839, 90 S. E. 2d 249. False arrest and imprisonment cases, such as *State* v. *Hunter*, 106 N. C. 796, 11 S. E. 366, and *Pinkerton* v. *Verberg*, 78 Mich. 573, 44 N. W. 579, also are of little assistance.

committed unless (1) the defendant first was told by a policeman to move on, (2) he thereafter continued to "saunter or loiter for more than seven minutes", and (3) the policeman then determined, at the expiration of that time, that the sauntering or loitering was unreasonable. The officer was made legislator, prosecutor and judge. One person might stand on the street in his presence for an hour and go free if the officer considered it reasonable; another might saunter for seven minutes and be arrested if the officer did not deem his sauntering reasonable.

Richmond police have no such discretion under the ordinance in question here. When a person stands on a public sidewalk and an officer tells him to move, failure to move completes the offense. The officer is not empowered to rule on whether the refusal appears to him to be reasonable. The test of reasonableness, the court below said, is not one to be applied by the policeman. It "is a matter for judicial determination, and depends upon the circumstances surrounding each arrest. If, upon judicial review, it appears that the police officer has acted arbitrarily, it is the duty of the courts to acquit the alleged offender. On the other hand, if the officer has acted reasonably to promote the public welfare and peace, his actions must be upheld." 202 Va. 707, 713, 119 S. E. 2d 488, 492.

The court below cited *People* v. *Galpern*, 259 N. Y. 279, 181 N. E. 572, which upheld conviction of an attorney arrested for failing to move on while talking with five or six friends on a sidewalk free from crowds and the potential for violence shown in the record of the present case. There the statute deemed guilty of disorderly conduct one who "congregates with others on a public street and refuses to move on when ordered by the police." The New York Court of Appeals said:

"A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order. That is not the case here." 259 N. Y. at 284-85, 181 N. E. at 574. The Court of Appeals recognized the need for entrusting police with the exercise of reasonable discretion, as did a lower court in *People* v. *Friedman*, 6 Misc. 2d 271, 14 N. Y. S. 2d 389, 392.

As the court below said, the Richmond ordinance "is of a regulatory nature and is designed to preserve the safety, peace, good order and convenience of the inhabitants of the City, and to prevent conduct in the streets dangerous to the public. * * * The important consideration is whether the regulation is designed to afford free and unobstructed passage of the sidewalk for the preservation of public order * * *". 202 Va. at 710, 713; 119 S. E. 2d at 490, 492.

Such preservation of the right of the general public to freedom of passage over the sidewalks was the object of similar legislation upheld in *Ex Parte Bodkin*, *supra*; *Commonwealth* v. *Challis*, *supra*; *State* v. *Sugarman*, 126 Minn. 477, 148 N. W. 466; *Tacoma* v. *Roe*, 190 Wash. 444, 68 P. 2d 1028; *Benson* v. *Norfolk*, 163 Va. 1037, 177 S. E. 222, and *Chariton* v. *Fitzsimmons*, 87 Iowa 226, 54 N. W. 146.

Review of ten-dollar fines was justified in *Thompson* v. *Louisville*, 362 U. S. 199, because Kentucky law made the Louisville Police Court the court of last resort.

No such situation is presented here. Appellant was first convicted in the Richmond Police Court; received as a matter of right a retrial, *de novo*, on appeal to the Hustings Court, with right of jury trial,[5] which she waived (R. 5); obtained a writ of error from the Virginia Supreme Court

[5] Va. Code §§ 16.1-132, 16.1-136.

of Appeals for reconsideration of its holding in *Benson* v. *Norfolk*, *supra*, and was heard by the entire bench. Justice does not demand that she have a fourth day in court.

CONCLUSION

In her appeal, as in her conduct on the sidewalk, appellant recognizes no necessity for the interests of her community as a whole, in a time of tension, to be balanced against her desire to do exactly as she pleases. Since no federally protected right has been affected, the appeal should be dismissed.

Respectfully submitted,

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